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No. 2444

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT, DISTRICT OF CALIFORNIA.

MAX STEINFELDT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Reply Brief of Plaintiff in Error

P. S. EHRLICH,
Attorney for Plaintiff in Error.

Filed this ..... day of December, A. D., 1914

FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.

THE TEN BOSCH COMPANY, SAN FRANCISCO

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REPLY BRIEF OF APPELLANT IN ERROR.

Counsel for the defendant in error seems to have no understanding of what is meant by the words in the statute "after importation." His idea of importation is similar to a rubber band. It may be stretched to meet the exigencies of the case. Without burdening this Court with long citations, we would merely call the Court's attention to plaintiff in error's open-

ing brief, page 9, and the case of *U. S.* vs. *Caminetti,* 194 Federal 905, where it is distinctly held that the act of importation is complete as soon as the article is within the three mile limit.

Counsel for defendant in error, in his brief, contends further that the opium statute is a valid exercise of the power of Congress to collect revenue, and should be sustained as a revenue statute.

As was suggested by the Court in the oral argument, we need only reply that the opium statute on its very face refutes this argument. There is a direct prohibition against the importation of any and all opium, and then a proviso that opium for medicinal purposes alone may be imported. A revenue measure is never an exclusionary measure.

In this connection, we call the Court's particular attention to the case of *In re Heff,* 49 L. Ed. 848, quoted in our opening brief, and to the case of *United States* vs. *Dewitt,* 19 L. Ed. 594, in which a section of the Internal Revenue Act, seeking to make it a crime to mix for sale certain oils under a certain degree of temperature, was held unconstitutional insofar as it operated within the limits of any particular State. In the course of the argument it was urged that since the section was found in the Internal Revenue Act, it was a revenue measure. Similar reasoning was used on the oral argument in the case at bar. We quote from the decision of the Court as follows:

> "The record shows an indictment against the defendant under the 29th section of the Internal

Revenue Act of March 2, 1867 (14 Stat. at L., 484), which makes it a misdemeanor, punishable by fine and imprisonment, to mix for sale naphtha and illuminating oils, or to sell or offer such mixture for sale or to sell or offer for sale oil made of petroleum for illuminating purposes, inflammable at less temperature than 110 degrees Fahrenheit. The offense charged was offering for sale oil made of petroleum of the description specified in the statute, at Detroit, Michigan.

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"The first of these questions relates exclusively to the case made by the indictment. The fact charged was a sale of a particular description of illuminating oil within the limits of a State. There was no allegation that the sale was in violation or evasion of any tax imposed on the property sold. It was alleged only that the sale was made contrary to the statute.

"The question certified resolves itself into this: Has Congress power, under the Constitution, to prohibit trade within the limits of a State?

"That Congress has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.

"It has been urged in argument that the provision under which this indictment was framed

is within this exception; that the prohibition of the sale of the illuminating oil described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles; but the analogy appears to fail at the essential point, for the regulations referred to are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed; while, in the case before us, no tax is imposed on the oils the sale of which is prohibited. If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils and, consequently, the revenue derived from them, by excluding from the market the particular kind described.

"This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes.

"THERE IS, INDEED, NO REASON FOR SAYING THAT IT WAS REGARDED BY CONGRESS AS SUCH A MEANS, EXCEPT THAT IT IS FOUND IN AN ACT IMPOSING INTERNAL DUTIES. STANDING BY ITSELF, IT IS PLAINLY A REGULATION OF POLICE.

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"As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as, for example, in the District of Colum-

> bia. Within State limits, it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions (License Cases, 5 How. 504; Passenger cases, 7 How. 283; License Tax cases, 5 Wall. 470, 72 U. S., XVIIIM 500, and the cases there cited), that we think it unnecessary to enter again upon the discussion."

In his brief counsel for defendant in error insists that because opium was once admitted under the tariff law, upon payment of duty, that therefore the statute involved here is a revenue statute.

This is an argument *reductio ab adsurdum.* The fact that a measure was once a revenue measure, and that at one time opium was dutiable, would not signify that if Congress changed its legislative intent in respect to opium and desired to exclude it from entry into the United States, any new statute concerning opium would still remain a revenue measure. A revenue measure is a measure for the purpose of producing duty and revenue. An act of Congress excluding an article from this country is clearly not a revenue measure, but a measure passed under the commerce power of Congress to protect this country from the dangers of allowing such an article within the country.

Not only does counsel for defendant in error claim that the customs clause, and not the commerce clause, in the Constitution governs, but he further contends that this section should be sustained as an exercise by Congress of the power given in the Con-

stitution to make all laws necessary and proper to carry into execution the enumerated powers of Congress, amongst which is the power to raise revenue. This argument falls of its own weight if the opium statute involved is not a revenue measure.

Again, to quote from the brief of counsel for the defendant in error:

> "Is Congress only allowed to take out one bite of the cherry and leave the remainder?"

To that, I would reply: "Yes, if the remainder is forbidden fruit." The mere fact that Congress has the right to take one bite is no reason for arguing that Congress may take a dozen more. Congress can only bite, to speak figuratively, as far as the Constitution allows it to bite, and where the Constitution erects a prohibition, Congress stops.

Congress to follow out this metaphor may perhaps eat a dozen pears but it may only take one bit out of a cherry.

Defendant in error further argues that a person receiving goods bought from the army, if he received them off the Presidio Reservation and within the territory of any State, would not be subject to arrest if our theory were correct. This is absolutely fallacious, as the power to punish for receiving goods bought from army stores is under an entirely and totally distinct power of Congress. In fact the arguments of counsel for defendant in error shows that he fails to grasp the fundamental characteristic of our constitutional government, to-wit: the fact that the Federal government is constituted of

delegated powers and that when the Federal government acts through its legislative body, it must find authority in one of its delegated powers, and is circumscribed in the exercise of any of its delegated power by the interpretation which the Supreme Court of the United States has given to that delegated power. Thus, since in this case Congress has acted under a delegated power, to-wit: the commerce clause of the constitution, all its action under the commerce clause is of necessity dependent upon the interpretation given the commerce clause by the Supreme Court. This most fundamental fact, counsel for defendant in error has totally failed to grasp.

The only other point raised by counsel for defendant in error is that the case of *United States* vs. *Keller,* 53 L. Ed. 737, is not in point. Before discussing this point, it is to be emphasized that we rest upon no one single case. Our argument rests upon fundamental principles of American Constitutional law, and our purpose in quoting this case or in quoting any of the cases in our brief has not been to ask the Court, upon mere precedents, to decide this question; but we have quoted these cases to show the principles of constitutional law applicable to this case. However, as pointed out on the oral argument, the only distinction possible between these two cases, the Keller case and the case at bar, is the fact that in the case at bar the Act compels the defendant to know of the unlawful importation, whereas, in the Keller case,

there is no such provision, but possession alone is made *prima facie* evidence of guilt. However, both cases are analogous in this respect, and this is the fundamental respect—IN NEITHER CASE DID THE STATUTE REQUIRE ANY CONNECTION OR RELATIONSHIP WITH THE UNLAWFUL IMPORTATION.

Knowledge alone is insufficient to create Federal jurisdiction under the particular facts here involved.

It is also pointed out that after the decision in the Keller case, Congress amended the section and inserted in two places in the section hereinbefore held unconstitutional, the words: "In pursuance of such illegal importation." The amended section has never come before the Supreme Court for adjudication. But we are not even here concerned with whether or not the insertion of the words: "In pursuance of such illegal importation" is enough to avoid the pitfall of unconstitutionality. In the case at bar, there are no words identical or in anywise equivalent in their legal significance to these words: "In pursuance of such illegal importation." By no stretch of the imagination can we read into the section of the Act those words, and by no construction can the words "knowing the same to have been unlawfully imported" be held to be the legal equivalent of "in pursuance of such illegal importation."

This question was incidentally touched upon in the case of *United States* vs. *Krsteff,* 185 Fed. 203, where the Court, in commenting upon the power of Congress to punish persons dealing with alien women

for immoral purposes, after importation, used the following significant language:

> "It is clear Congress has no such power unless by apt words in the statute THOSE DEALINGS SHALL RELATE AND HAVE CONNECTION WITH SOME MATTER OF IMPORTATION WHICH IS MADE UNLAWFUL BY CONGRESS, AND THE MATTER OF UNLAWFUL IMPORTATION SHALL BE KNOWN TO THE PARTY SOUGHT TO BE CHARGED."

Thus not only is knowledge required by this decision but connection or relation with the unlawful importation as well.

Counsel for defendant in error endeavors to nullify the effect of the cases quoted as to the interpretation of the commerce power of Congress by the mere statement that these cases solely apply to interstate and not foreign commerce. In answer to this I would state that the section of the opium statute herein involved applies not only to foreign commerce but to interstate commerce as well, and further that the logic and reasoning of the Supreme Court in these interstate commerce decisions applies with equal force and with equal reason to an interpretation of the foreign commerce clause in the constitution. If we admit the reasoning of counsel for defendant in error there is never a termination of foreign commerce, and an article once in foreign commerce is always in foreign commerce.

In closing it may be emphasized as being of peculiar significance that Justice Harlan in the "Lottery Tickets" cases in his decision limits his decision to

the *interstate traffic* in lottery tickets solely. Why, we ask, these limitations? Why did Justice Harlan not say that the power of the Federal Government in view of the fact that lottery tickets are contraband extends unlimitedly anywhere in the United States?

Respectfully submitted,

P. S. EHRLICH.